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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-248

UNITED STATES GYPSUM COMPANY,
Petitioner and Defendant-Appellee-Cross-Appellant Below,

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent and Plaintiff-Appellant-Cross-Appellee Below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION.

INTEREST OF THE AMICUS CURIAE.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and

* Consents of all parties to the participation of the amicus in this proceeding have been filed with this Court.

professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' view on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court and Courts of Appeals.*

The instant case raises issues of fundamental importance for a significant number of the Chamber's members in the ordinary conduct of their businesses.

The underlying issue presented here is whether a purchaser of an ongoing business enterprise may be compelled to accept his predecessor's labor contract in part or in its entirety when he has not consented to be bound by this agreement. The decision below involves not only the enforcement of an arbitral award, following a judicial determination that the purchaser was obliged to arbitrate, but in addition, stands as authority that an arbitrator may require an unwilling purchaser to adopt the substantive terms of the seller's contract with a union. The court below based its decision on rehearing in part upon its reading of this Court's opinion in *Howard Johnson*, ... U.S. ....., 94 S.Ct. 2236 (1974).

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* *Howard Johnson Company Inc.* v. *Detroit Local Executive Board Hotel, etc. International Union*, ... U. S. ...., 94 S.Ct. 2236 (1974); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *N.L.R.B.* v. *Textron, Inc.*, ... U. S. ...., 85 LRRM 2945 (1974); *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local* 419, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, ... U.S. ...., 85 LRRM 2913 (April, 1974), *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, ... F. 2d ...., 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N. L. R. B.*, No. 73-3264 (CA 5, 1973).

In *Howard Johnson* this Court appeared to suggest that under *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), a purchaser could be compelled to arbitrate pursuant to the terms in his predecessor's labor contract if he retained virtually intact the represented employees of his predecessor. The practical effect of *Wiley* is to impose in whole or in part the terms of a seller's labor contract upon a non-consenting buyer—just as occurred in the instant case. Thus, it should be determined whether continued homage to *Wiley's* rationale, even in this limited respect, contravenes clear Congressional purpose as reflected in the National Labor Relations Act (29 U.S.C. Sec. 141, *et seq.*) and as enunciated by this Court in *N.L.R.B.* v. *Burns International Security Services, Inc.* (406 U.S. 272 (1972) and *H. K. Porter Co.* v. *N.L.R.B.* (397 U.S. 99 (1970)). In addition, it should be decided if the precepts of *Burns* without resort to *Wiley* are wholly sufficient to protect employee interests, and whether continued adherence to *Wiley* may well produce deleterious consequences for the industrial community, including employees who may otherwise have an opportunity to survive a change of company ownership. Thus, a potential purchaser who desires to enjoy flexibility while operating the purchased enterprise may well be forestalled from consummating his intended purchase or foreclosed from hiring his predecessor's employees in order to avoid being tied to his predecessor's labor contract pursuant to the reach of *Wiley*.

A second issue raised for review is whether an arbitrator may inflict a penalty upon an employer when the Labor Board would be statutorily banned from doing so. This issue, just as the first, requires an examination of the value of a uniform labor policy regardless of the forum selected to resolve a dispute.

The matters raised by this case are of grave and national concern since the ability of employers generally to invest in businesses and make necessary changes in personnel, practices and policies in order to insure productivity is unduly restricted by compelling them to arbitrate under the terms of the predecessor's labor agreement.

Since the Chamber's membership consists of numerous employers who frequently and regularly are in a position to acquire or sell ongoing businesses, and who must therefore know their rights and duties in this area, the Chamber is vitally concerned about the manner by which these questions will be resolved by this Court. Further, because of its broad representation of employers, the Chamber is in a position to present arguments to this Court concerning the questions involved herein which might not otherwise be advanced by the parties.

REASONS FOR GRANTING THE WRIT

A. Introduction

The Petitioner, Gypsum, purchased the plant and the assets of another company, United, expressly excepting from this purchase United's labor obligations. Gypsum retained all but three of United's employees and operations continued at the same location without substantial change or appreciable hiatus. Though a collective bargaining agreement existed between United and the United Steelworkers of America covering the employees who survived the change in ownership, Gypsum declined to assume the terms or obligations of this agreement. After a lengthy dispute, the court below affirmed a district court's judgment requiring that Gypsum and the Union arbitrate concerning the survival of the pre-existing contract, including terms relating to the impact of the sale upon seniority and the dues check-off.[1] Following this ruling by the court, the arbitrator held that Gypsum was bound by the *entire* contract made between United and the Union; ordered that a new wage scale be put into effect pursuant to a wage reopener; and required Gypsum to pay to the Union an amount equal to an alleged check-off obligation without the right of recoupment from em ployees. Subsequently, the court below, relying upon this Court's

1. *United States Gypsum Company* v. *United Steelworkers of America, AFL-CIO,* 384 F. 2d 38, cert. den. 389 U.S. 1042 (1972).

decision in *Wiley*,[2] held that the arbitrator's award was within his discretion and powers.

This Court has previously confronted the obligations of a purchasing employer to the employees of his predecessor.[3] In *Howard Johnson*, this Court attempted to effect a balance between two judicially recognized and distinct interests pulling in opposite directions: the interest of a new employer to operate the purchased enterprise with necessary business flexibility and with his own independent labor force; the interest of the predecessor's employees who were hired by the purchaser to be protected from sudden changes in their terms and conditions of employment. The balance struck by this Court in *Howard Johnson* has further narrowed the perimeters of *Wiley*, as this Court appears to have (i) restricted its principles to situations where there existed a substantial continuity in the identity of the labor force before and after the ownership change and (ii) determined to shield only those employees who are retained by the purchaser from sudden alterations in their working conditions.

The *amicus* submits, however, that the employees who are retained by a purchasing employer may, consistent with this Court's concern, be sheltered from changes in their working conditions by the principles enunciated in *Burns*, without recourse to *Wiley*, and that consequently the retention of *Wiley's* precepts no longer contributes positively to the nation's labor policy. Indeed, *Wiley's* principles are diametrically opposed to this policy as reflected in Section 8(d) of the National Labor Relations Act. Accordingly, this cause presents to this Court an ideal vehicle to explore whether the directives of *Wiley* need now be accorded any deference in view of the protections afforded by *Burns* both to employer and employee interests.

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2. *John Wiley & Sons, Inc.* v. *Livingston, supra.*

3. *N.L.R.B.* v. *Burns International Security Services, Inc., supra, John Wiley & Sons, Inc.* v. *Livingston, supra, Howard Johnson Company, Inc.* v. *Detroit Local Executive Board, Hotel, etc. International Union, supra.*

B. The Principles Promulgated in Burns Provide Ample Protection for Employees Who Survive an Ownership Change and Unlike Those Enunciated in Wiley Are in Accord with the Nation's Labor Policy

1. The Principles of Burns Protect the Rights of Employees

In *Burns* this Court articulated the principle that where a purchasing employer plans to retain all of his predecessor's unionized employees he must consult with the bargaining representative of those employees before he fixes initial terms of employment. Furthermore, this Court in *Burns* held that even where a purchaser does not initially retain all of his predecessor's employees, he will nonetheless be obliged to bargain with their representative at or about the time he begins operations if he has then hired a full compliment of employees and a majority of these had been employed by the predecessor and there represented by the union presently seeking bargaining rights.[4]

It is evident that this Court in *Burns*, just as in *Howard Johnson*, sought to afford protection to employees who survive a change in business ownership from unanticipated shifts in their employment conditions. Reading *Burns* together with the restrictions imposed upon *Wiley* by *Howard Johnson*, it is submitted that the principles of *Burns* without resort to those of *Wiley* satisfy this Court's concern for these surviving employees.

4. The union will be presumed to represent a majority of the purchaser's employees and unless he can overturn this presumption he will be required to recognize and negotiate with the union. This essentially was the fact situation in *Burns*, since a majority of the employees hired by the new employer consisted of employees who had worked for the predecessor. These employees performed the same functions as they had with the precessor, with little interruption in their employment. Thus, "Burns' obligation to bargain . . . stemmed from its hiring of [the predecessor's] employees and from the recent election and Board certification . . . the 'source of [Burns'] duty to bargain with the Union is not the collective bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year." 406 U.S. 272, at 278-279, 287.

Where a purchasing employer determined to retain and thereafter hired intact virtually the entire unit of his predecessor, the employees are guarded from sudden changes in their working conditions by the *Burns* rationale without recourse to the arbitral protections contained in *Wiley*. That is, adhering to the lesson of *Burns*, a new employer who plans to and does retain all of the employees of his predecessor's unit must also preserve their existing working conditions as he begins his new operation until he has negotiated with the bargaining representative of these employees. It follows that independent of *Wiley's* mandate to arbitrate, there can be no abrupt and unanticipated change in the terms and conditions of employment of the employees who survive the ownership change, and this Court's concern for these employees has been satisfied without resort to the arbitral demands of *Wiley*.

It is not apparent that this Court in *Howard Johnson* intended that the principles of *Wiley* be extended beyond the factual situation just discussed. However, it is submitted that even in the distinct factual situation presented by the *Burns* decision itself, the precepts of that decision afford ample protection to those employees who are hired by the purchaser. That is, when as in *Burns* a new employer while preparing to begin his operations hires his work force gradually, he may lawfully set his initial terms of employment without consulting with the labor organization representing his predecessor's employees; under *Burns*, only when he has hired his full compliment of employees and a majority of these consists of his predecessor's workers, does his bargaining obligation arise. This bargaining duty satisfies the employee rights recognized by this Court as valid in the successorship area. Where a new employer has no obligation under the Labor Act to negotiate with a union before fixing initial terms of employment even though these terms may differ from those of his predecessor, there can exist no obligation to arbitrate before setting these terms if the consistency in labor policy envisioned by this Court in *Howard Johnson* is to be

achieved. Thus where this Court would not require an employer to bargain before implementing his initial employment terms, it should not obligate him to arbitrate pursuant to his predecessor's contract and thereby forestall him from formulating these terms. To require arbitration under Section 301 but to permit unilateral imposition of hiring terms under Sections 7 and 8(a)(5) of the Labor Act would be to permit an employer's duty to depend upon a union's choice of forum. Such a result would be inconsistent with this Court's mandate in *Howard Johnson*.[5]

Furthermore, in a factual situation where the purchasing employer may lawfully set his initial terms of hire, as described above, his employees will not likely be subjected to sudden or unexpected changes in their working conditions after the purchaser's bargaining obligation later arises. Rather, that employer, following *Burns*, will likely seek to maintain the conditions he has initially set and fulfill his obigations to bargain with the representative of his empoyees before altering these terms.

As demonstrated above, there is no underlying need to retain the arbitral protection mandated by the precepts of *Wiley*. Furthermore, the continued vitality of the decisional precedent of *Wiley* may well discourage continuity in employment relationships. That is, a cautious purchaser, normally amenable to hiring his predecessor's employees and negotiating with their union to shape future relationships may instead opt to hire a new work force in order to maximize operating flexibility, rather

5. In *Howard Johnson* this Court recognized that the federal common law regarding the enforcement of collective bargaining agreements must be

> "fashion[ed] from the policy of our national labor laws . . . It would be plainly inconsistent . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the Courts in a suit under Section 301, and thus to permit the right enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims." 42 U.S. L. W. 4834, 4836.

than to retain his predecessor's employees and to risk an arbitrator's award saddling him with the ossified contractual obligations of that former employer.[6]

2. The Principles of Wiley Contravene Congressional Intent, National Labor Policy and Subsequent Decisions of This Court

The nation's labor policy as reflected by Section 8(d) of the Labor Act and by congressional commentaries repudiates compelling a party to agree to substantive contractual obligations and instead manifests a clear intendment that bargaining agreements should be consentual, the result of voluntary negotiations between the contracting parties who must live under the terms of the agreement reached. Thus, the relevant portion of that statutory section states that while there is a duty imposed upon parties to bargain in good faith, neither party in the negotiations must agree to a proposal or make a concession. This Court has explicitly confirmed its acceptance of that statutory section when in *Burns* it stated.

> "Congress has consistently declined to interfere with free collective bargaining and has preferred that device, or voluntary arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes." 406 U.S. at 282.[7]

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6. An employer who is willing to adhere to his statutory bargaining obligations but who nonetheless decides not to hire his predecessor's employees in order to avoid being bound to a pre-existing contract by an arbitral award under *Wiley* would seem to be acting lawfully. Thus, the Labor Act imposes no obligation upon an employer to agree to substantive contract terms. To be distinguished is a situation where an employer unlawfully refuses to hire his predecessor's employees solely because they are union members or in order to avoid having to bargain with the union. *Howard Johnson, supra,* note 8.

7. This Court has more recently stated that there exists "an important labor policy opposed [to] [re]quiring the successor employer with the obligation of the [predecessor's] labor agreement." *Golden*

To accord continued vitality to *Wiley*, however narrow its current perimeters, is to contravene the congressional scheme endorsing voluntary collective bargaining but disavowing compelled agreements. Thus, while *Wiley's* requirements of arbitration may not on their face enjoin a new employer to honor other substantive terms of his predecessor's contract, the practical effect of *Wiley's* dictates is to infuse the predecessor's contractual obligations upon the operations of the purchaser, since the arbitrator will undoubtedly find that the predecessor's contract survived the change in ownership in its entirety.[8] Retention of *Wiley's* directives then effects indirectly what Congress has expressly proscribed by Section 8(d) of the Labor Act.[9]

This position is illustrated by the decision below. Thus, the court below upheld an award requiring the Petitioner not only to abide by his predecessor's entire contract but, in addition, to pay wages retroactively accordng to a new wage scale forged by the arbitrator and to give to the Union a sum equivalent to dues that might have been "checked off", despite the fact that no bargaining agreement required either of these latter two obligations. This award is barred by the policy underpinning Section 8(d) of the Act and by the rationale of this Court's decisions in *Burns* and *Porter*. The court below attempted to distinguish *Porter* from the instant case by

State Bottling Company, Inc. v. *N.L.R.B.*, 414 U.S. 168 (1973), 42 U.S. L. W. 2039 at p. 4044. This Court has consistently maintained this view; *H. K. Porter* v. *N.L.R.B. supra*, held that the Labor board could not require an employer to accept a union dues check-off provision in his labor contract, even though the employer steadfastly refused to negotiate about this clause.

8. As an example, the arbitrator in *Elesco Smelting Corp.* (56 LA 1256 (1971)) required the successor to pay holiday bonuses, though such payment would cause substantial economic hardship, where the predecessor had for many years made these payments. And the arbitrator in the instant case, as will be discussed *infra* similarly held the purchaser—the Petitioner—bound by the entire contract. The safety valve of judicial review is of little utility since, just as did the court below, courts narrowly examine arbitration awards.

9. See footnote 5, *supra*.

observing that in *Porter* the parties had reached the bargaining table before the employer refused to negotiate, while here the Petitioner refused even to "sit down at the bargaining table and negotiate." A-28. The court below also stated that unlike *Porter*, where the Board ordered the employer to sign a contract containing a term the Union had been unable to secure in negotiations, the arbitrator's award below simply compensated the Union for the Petitioner's contract breach. A-27, 28.

To state this purported distinction is to demonstrate its untenability. There is no distinction between the relief barred by *Porter* and the remedy that the court below suggests that the arbitrator has power to impose. In either case the employer has not agreed to the wages and other employment conditions which are imposed upon him and for which he is as fully responsible as if he had agreed to them. Then, too, though the award of wages may be dubbed compensation to remedy a contract breach (as it is by the court below), the payment to employees is similar to benefits that would be produced by the retroactive imposition of contract terms. The major premise of *Porter* is that the Board may not dictate the substantive terms of employment that will govern the bargaining relationship of the parties. Consequently, by awarding wages and check-offs which were not agreed to by the Petitioner, and by imposing the entire pre-existing contract on him without his consent, the arbitrator and the court below accomplished what *Porter*, recognizing the will of Congress, prohibits.

Whether the Court-enforced arbitral awards comprehend infusing the pre-existing contract in its entirety or only in part upon the operations of a non-consenting purchaser is not material. To enforce either type of award contravenes Congress' intent.[10] Moreover, neither is suited to diminish industrial discord. That is, to judicially approve an award inflexibly binding a purchaser

10. To compel a purchaser to honor even the arbitration terms of his predecessor's contract is to require him to adopt a substantive term and thereby conflicts with congressional purpose.

to his predecessor's entire contract is to fail to consider that manifold changes in employment relationships accompany any change in ownership due to the distinct policies and operational methods of the seller and buyer. Indeed, the possibility of being chained by the pre-existing contract as a result of an arbitrator's award may well forestall the purchase or, as stated, foreclose the retention of the predecessor's employees. To permit an arbitrator to select which terms of the old contract will bind the new employer is no more satisfactory. A collective bargaining agreement must be viewed as a whole, as a blend of give and take achieved through voluntary negotiations, with each term interdependent. Thus, the existence and quality of each benefit depends upon the presence and amount of others and upon reciprocal employee obligations. To permit an arbitrator to decide which of these interdependent terms survive to bind a purchaser is to allow a contortion of the agreement initially reached and to produce a document not reflective of the concerns of the contracting parties, including those employees who survived the ownership change. It is evident that the purchaser and his employees should be left to work out their current problems over the bargaining table. The result achieved will better mirror the present interests of the parties who must be governed by the agreement and thereby contribute to a durable bargaining relationship and industrial harmony.

Further, if contract terms are imposed under the guise of compensation or otherwise, these terms will inevitably serve as a floor from which bargaining for subsequent contracts will begin. The initial infringement upon the collective bargaining process has thus been reinforced. Accordingly, this Court should now review and reverse the decision below since it endorses an arbitration award that conflicts with the established labor policy enunciated by this Court in *Porter, Burns* and *Howard Johnson.*

It is evident from the foregoing that *Wiley*, despite the foregoing decisions, continues to present significant problems in the business acquisition area of labor relations. On the one hand, its precepts are not required to shelter the judicially recognized

rights of employees who survive an ownership change; on the other, continued deference to *Wiley's* rules serves only to frustrate employers as they seek to acquire businesses and to operate them with the freedom necessary to insure their success for the benefit of management and employees alike. Independently, *Wiley* conflicts with a transparent intent of Congress as manifested by Section 8(d) of the Labor Act. The instant cause represents a means for this Court to examine and resolve the on-going problems caused by the continued existence of *Wiley*. The Chamber submits that a viable alternative to the present rules would permit the substantive terms of a pre-existing contract to survive, whether by arbitration award or Labor Board decision, only if the new employer demonstrates an intent —other than by hiring the predecessor's employees—to be bound by those terms. Adoption of this alternative would prevent further violence to the commands of Section 8(d) and simultaneously shield employees from sudden changes in their working conditions to the extent countenanced by *Burns*.[11]

C. The Decision Below Sanctions an Award That Exceeds the Authority Conferred Upon Arbitrators

Independently of the reasons set forth above, this Court should grant the petition since the decision below sanctions an award that was given in excess of the arbitrator's authority. That is, the portion of the award relating to the "check off" is a grant of damages or the infliction of a penalty; as such, it may not be conferred by an arbitrator since he may not do what the nation's labor policy as reflected in the Labor Act prohibits if the uniform labor policy as endorsed by this Court in *Howard Johnson, supra,* and *Textile Workers* v. *Lincoln Mills* (353 U. S. 448 (1957)) is to be realized.[12]

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11. Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 Minn. L. Rev. 1051, 1102.

12. Note particularly the discussion of *Porter* in Section B2 *supra* to the effect that no arbiter, whether administrative agency,

As this Court has recognized:

> "The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with backpay." *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 665 (1954.)

The limitation on remedial power under the Labor Act was highlighted in the *Republic Steel* case.[13] There, this Court refused to enforce a Board order that required an employer to pay sums of money to third parties in addition to paying compensatory backpay to his employees. In that case, the Board had directed the employer to deduct from back wages due to wrongfully discharged employees, the amounts they had received from governmental agencies that had employed them on relief projects, and to then pay the deducted sums to the Government. In reaching its decision that reimbursement to third parties was not sanctioned by the Labor Act, this Court held that such payments amounted to "an exaction neither to make the employees whole nor to assure that they can bargain collectively with their employer through representatives of their own choice." at pp. 12-13.[14]

The award below requiring the Petitioner to pay dues to the Union, just as the relief forbidden in *Republic*, has nothing to do with making employees whole for any losses, and instead, is an exaction of damages. Accordingly, since an arbitrator's awards must be fashioned in harmony with national labor policy, an

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court, or arbitrator can require a party to agree to a collective bargaining agreement, in whole or in part where that party does not consent to be bound.

13. *Republic Steel Corp.* v. *N.L.R.B.*, 311 U.S. 7 (1940).

14. Congressional commentaries endorse the position that damage awards are excluded from the arsenal of remedies under the Act. *E.g.*, 93 Cong. Rec. 4858 (1949). McGuiness, *Is the Award of Damages for Refusals to Bargain Consistent with the National Labor Policy?* 14 Wayne L. Rev. 1086 (1968).

arbitrator similar to the Board is proscribed from awarding damages. It follows that the Court below erred in enforcing the check-off award granted in the underlying arbitration proceeding.

Furthermore, whether or not the check-off award is considered to be "damages", the arbitrator's asserted power to shift costs from employees to the employer can be justified only if he is authorized to inflict penalties, since payments to the union are wholly unrelated to making employees whole and only serve to punish the employer.

It is acknowledged that the Labor Board has no power to fix a penalty upon an employer whether the penalty is designed to rectify past or to curb future conduct. Thus, this Court has interdicted the Board from assessing penalties against persons who have committed unfair labor practices, even if the infliction of such punitive relief would foster the policies of the Act. In the words of this Court:

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties of fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. N.L.R.B., supra,* at pages 11, 12.

Since this Court has supported uniformity in labor policy, as heretofore discussed, just as a Board order may not inflict penalties, neither may an arbitral award; consequently, for this

additional reason the check-off award may not be sustained and the court below must be reversed by this Court.[15]

CONCLUSION

For the reasons set forth above, and for those urged by the Petitioner, it is respectfully submitted that the writ of certiorari prayed for herein should be granted.

Respectfully submitted,

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15. The same arguments can be advanced with respect to any effort to require an employer to reimburse the Union for its litigation costs, as was the subject of this Court's recent *Heck's, Inc.* decision (*N.L.R.B.* v. *Food Store Employees Union*), ... U.S. ...., 86 LRRM 2209 (1974). Note also *Tiidee Products, Inc.*, 426 F. 2d 1243 (CA DC, 1970) where the court, despite recognizing that the N.L.R.B. has wide remedial latitude, refused to order a remedy that would require the imposition of contract terms containing benefits that allegedly would have been paid but for illegal conduct where the employer had not agreed to these benefits.